No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1958

TAK SHAN FONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the Court of Appeals (R. 14a–17a; Pet. App. A 11–14) is reported at 254 F. 2d 4. The findings of fact and conclusions of law of the District Court appear at R. 4a–5a.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1958 (R. 18a). The petition for a writ of certiorari was filed on June 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an alien whose year of physical residence in the United States followed an unlawful entry in

1952 may be naturalized under 8 U. S. C. (Supp. V) 1440a (2) on the basis that he had on a previous occasion been lawfully admitted for 29 days as a seaman and had subsequently departed from the United States.

STATUTE INVOLVED

The Act of June 30, 1953, ch. 162, § 1, 67 Stat. 108, 8 U. S. C. (Supp. V) 1440a provides in pertinent part:

> Notwithstanding the provisions of sections 310 (d) and 318 of the Immigration and Nationality Act, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of the Immigration and Nationality Act, except that— * * *

STATEMENT

Petitioner, a native and citizen of China, last entered the United States on January 27, 1952, at Newport News, Virginia, as a seaman. He was ordered detained on board as a mala fide seaman. He escaped and took employment ashore (R. 9a). On June 8, 1952, he was apprehended and after a hearing was

ordered deported by warrant dated January 15, 1954 (R. 9a–10a). On May 4, 1953, he was inducted into the United States Army. He served in the continental United States until May 3, 1955, when he was honorably discharged (R. 10a).

On December 22, 1955, he filed his petition for naturalization under 8 U. S. C. (Supp. V) 1440a, *supra*, p. 2, in the District Court for the Southern District of New York, in which he alleged that he was lawfully admitted to the United States in 1952 (R. 3a). At the hearing before the court, the Immigration and Naturalization Service recommended denial of the petition on the ground that his entry into the United States in 1952, the only entry discussed by the Naturalization Examiner, was unlawful (R. 9a–12a). Petitioner's attorney then notified the court that petitioner had been admitted to Honolulu, T. H., on two occasions prior to 1952. On August 24, 1951, he had been admitted at Honolulu as a seaman for 29 days and had departed with his ship. On October 15, 1951, at Honolulu, he was ordered detained on board ship. The Immigration and Naturalization Service verified these prior entries but opposed the petition because his last entry, *i. e.*, the one in 1952 which resulted in his year's presence in the United States, was illegal.[1] In his findings of fact and conclusions of law, the district judge found that petitioner had been lawfully admitted to the United States on August 24, 1951, at Honolulu, T. H., and granted his petition for naturalization (R. 4a–5a).

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[1] This information has been obtained from the Department of Justice file.

On appeal, the Court of Appeals reversed *per curiam*. It based its holding upon its previous decision in *United States* v. *Boubaris*, 244 F. 2d 98, in which it had held, with one judge dissenting, upon facts similar to those involved here, that 8 U. S. C. 1440a "required that the 'single period of at least one year' be immediately consecutive to the lawful admission required by that section." Such continuity was found lacking here (R. 14a–17a).[2]

ARGUMENT

Petitioner contends that his lawful entry to Honolulu, T. H., on August 24, 1951, for 29 days, makes him eligible for citizenship under 8 U. S. C. (Supp. V) 1440a, *supra*, even though his physical presence within the United States "for a single period of at least one year at the time of entering the Armed Forces" was not in any way connected with that legal entry, but rather followed his 1952 entry which was wholly illegal. This contention is not supported by the language of the statute, its history, or common sense.

8 U. S. C. (Supp. V) 1440a (2), by providing in one subsection for the naturalization of aliens who have "been lawfully admitted to the United States, *and* having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces" (emphasis added), requires that the physical presence must follow a lawful entry. Any other interpretation would mean that Congress, when it passed 8 U. S. C. (Supp. V) 1440a,

[2] Petitioner's motion for an *en banc* hearing was denied, with Chief Judge Clark noting that he agreed with the view of the dissent in *Boubaris*.

had in mind that it would apply to aliens who were in the country in violation of the immigration laws. The Committee reports (S. Rept. No. 378, p. 2, and H. Rept. No. 223, p. 2) (83d Cong., 1st Sess.) accompanying the bill which was finally enacted as 8 U. S. C. (Supp. V) 1440a state to the contrary that the act "contemplated benefits *only* for the alien who has effected lawful entry, either in an immigrant or nonimmigrant status" (emphasis added). As the majority of the Second Circuit Court of Appeals said in *Boubaris* (*supra*, at 100):

> Where Congress has meant an unlawful admission to be no bar to naturalization, it has specifically so provided. See e. g. 8 U. S. C. A. § 1001 (1946 edition) 58 Stat. 886, 887 (1944); where the language is: "* * * being unable to establish lawful admission into the United States," and also 8 U. S. C. A. § 1440 (1952), which contains similar language.

After petitioner left the United States with his vessel in 1951, his nonimmigrant status terminated—it was abandoned. (See *Bonetti* v. *Rogers*, No. 94, Oct. Term, 1957, decided June 2, 1958.) His subsequent application for admission in 1952 had no relation to his former lawful admission. He was seeking to effect a new admission. Consequently, his illegal entry—his last actual entry—is the only entry to be considered in connection with his petition for naturalization (cf. *Bonetti* v. *Rogers, supra; Brymer* v. *United States*, 83 F. 2d 276 (C. A. 9); *Werblow* v. *United States*, 134 F. 2d 791 (C. A. 2)). If, after petitioner's lawful admission in 1951, he had continued to remain in

the United States beyond his 29-day permit, the resultant unlawful status (failing to maintain status, 8 U. S. C. 1251 (a) (9)) would not bar naturalization under Section 1440a (*In re Apollonio,* 128 F. Supp. 288 (S. D. N. Y.)). But certainly Congress did not intend that because an alien had once been lawfully admitted as a nonimmigrant and had then departed, he nevertheless had a permanent status as a lawful immigrant even though his later, unconnected, entry was unlawful.

There is no conflict of circuits on this issue, the Second Circuit being the only one which has had the question for consideration. Decisions to the contrary in the Southern District of New York have been overruled by the holding of the Second Circuit in *United States* v. *Boubaris,* 244 F. 2d 98, and the instant decision. *In re Tchakalian's Petition,* 146 F. Supp. 501 (N. D. Cal.), the court treated an entry of a member of the armed forces after service overseas as a lawful entry and permitted naturalization even though the physical residence preceded that lawful entry. Regardless of the validity of its reasoning,[3] the decision that lawful entry *after* the continuous period of residence satisfies the statute does not serve petitioner here, where the original lawful entry had been terminated by departure and the necessary period of physical residence is not tied to any lawful entry. There

[3] The district court's decision was not appealed. The judgment was also supportable on the ground that the original entry was not in fact illegal since the applicant was a minor at the time the entry was made and the alleged illegality stemmed from his mother's intent, in entering on a transit visa, to remain here permanently.

must, at the very least, be a direct connection between the lawful admission and the required physical residence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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